

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO.: 2011-CA-16841-O
Jury Trial Volume III

JOHN MAHONY and DIANE
MAHONY, as husband and wife,

Plaintiff,

-vs-

JAMIE RODRIGUEZ and MARIA
RODRIGUEZ, as husband and wife,

Defendants.

DATE TAKEN: July 29, 2014

TIME: 9:00 a.m.

PLACE: Orange County Courthouse
425 North Orange Avenue
Orlando, Florida 32801

BEFORE: Honorable Patricia Doherty

Stenographically Reported By:
Susan Mullen

APPEARANCES

On Behalf of the Plaintiff:

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Q What did you tell him when you saw that?

A What I did say to that was we had the doors -- the windows locked and the door closed, but the AC return was right next to where he was pointing the fan, and I suggested to him to close that too because that might take whatever mold was there up to the -- into the other areas of the house, and he said, oh, good idea, I'm going to talk to Larry.

Q Did you see any other openings in the house by Mr. Smith?

A Yes. The second time after he called me again, and he showed me on the balcony, there was a couple of holes on the middle balcony, and I asked him what happened, and he said that Larry had asked him permission to -- I guess he wanted to see what was underneath, and he cut an opening, and I guess he said he found some water and just said, if he could punch a few more holes, and I guess he had a hammer, and he punched a few more holes in the balcony.

Q Did you see him use a hammer on the balcony?

A No, I was not there when he did that.

Q Did you see anything that looked like a hammer was used on the balcony?

A Yes. Some of the holes looked like it was just punched through.

1 Q During the time that you lived in the house, did you
2 ever walk out on those balconies?

3 A Yes.

4 Q Did you ever feel your foot go through any of the
5 balconies?

6 A No.

7 Q Did you ever feel like they could have gone through?

8 A No.

9 Q After that you became neighbors; is that correct?

10 A Yes.

11 Q So you weren't running to hide anywhere after the sell
12 were you?

13 A No.

14 Q Can you articulate clearly, being that you are a
15 certified contractor what you knew about the house?

16 A What I knew about was there had been a water leak, and
17 once we had that replaced, we didn't see no water coming through
18 it. After a few months, we just decided to close everything
19 back up, and never had any issues with it. For me keeping it --
20 whenever we had a bad rain, broom off the balcony, never saw any
21 water damage going through it, so I have no idea that the water,
22 you know, went through it according to the pictures because I
23 would sweep it off. I would not let it sit there on the porch.

24 Q What would you have done if you knew that there was
25 water intrusion through the house?

1 A I would have advised them that water would have gone
2 through it.

3 **Q What would you have done if you knew that mold was**
4 **there?**

5 A I mean I certainly would not have had my family there,
6 especially with my wife and her high-risk pregnancy. We were at
7 hospitals and doctors appointments and all of that, and I was
8 trying to take care of her.

9 **Q There was a \$50,000 offer?**

10 A Yes.

11 **Q Do you recall the nature of that transaction?**

12 A When we decided to put the house for sale, we had
13 bought some items after the house was finished on a separate
14 credit line and credit cards, that we had asked if we could take
15 those with us because we had bought those after, and so we
16 explained to them that they were not part of the house, that was
17 fine, but if we took off a fan that we spent a lot of money on
18 fans, chandeliers, and all of that, and we would have to put
19 another one back up.

20 **Q So if you took anything out, you'd have to replace it?**

21 A Yes.

22 **Q Were you planning on leaving the house bare as was**
23 **discussed before?**

24 A No.

25 **Q Who instigated the \$50,000 deal?**

1 A When he came, one of the first time he came to talk to
2 me, he asked me about those items that I guess, when he saw he
3 liked them, we had a movie theater in the house, and he said he
4 would like for them to stay, and I told him we were taking those
5 items because we would hopefully use them on another house, but
6 he said he wanted to keep them in the house because they matched
7 the house, or even the light fixtures, everything that -- and
8 that's when we started talking about maybe how much -- of I
9 could sell it.

10 Q Did you try to sell the house real quick just to get
11 that \$50,000?

12 A No, that was not -- we were not even -- we were just
13 going to take those items and not make anything on that sell.

14 MR. SOTO: No further questions.

15 THE COURT: Cross-examination?

16 MR. KELSKY: Yes.

17 CROSS-EXAMINATION

18 BY MR. KELSKY:

19 Q You were involved in a foreclosure lawsuit; is that
20 correct?

21 A Yes.

22 Q Where the bank actually sued you to retain the title
23 for the property, so they go ahead and do whatever it is that
24 banks do when they foreclose on a house, is that right?

25 A Yes.

1 Q And you stayed in the house for three years without
2 paying a mortgage?

3 A Yes.

4 Q You were represented in that lawsuit, correct?

5 A Yes.

6 Q Mr. Soto was your attorney in the foreclosure case,
7 correct?

8 A After we tried to keeping it, yeah, he was representing
9 us.

10 Q Now the problem with the flat roof above the baby's
11 room was that the waterproofing didn't work and that there was a
12 leak, correct?

13 A Correct.

14 Q In fact it was designed so that they had to take out
15 all of the tile, right?

16 A No. There was no tile in that area.

17 Q The flat roof, they had to lift up the flat roof,
18 correct?

19 A They removed the membrane and replaced the wood that
20 was wet.

21 Q And so they put all new plywood in, correct?

22 A In certain areas, yes.

23 Q And they torched it down?

24 A They put a torch down.

25 Q And the balconies themselves were considered flat

1 **roofs, correct?**

2 A They're a flat surface.

3 **Q I'm sorry?**

4 A They're a flat surface.

5 **Q Right. From the standpoint of a certified residential**
6 **contractor, they are considered flat roofs?**

7 A Yes.

8 **Q And isn't it true that the waterproofing that was done**
9 **on the flat roof over the baby's room was the exact same**
10 **waterproofing that existed on all of the decks?**

11 A Yes.

12 **Q So you had water coming from the flat roof above the**
13 **baby's room, correct?**

14 A Uh-huh.

15 **Q Is that a yes?**

16 A Yes.

17 **Q And then you went ahead, and you knew that there was**
18 **standing water on the balconies that had the stained**
19 **waterproofing structure as the roof that had to be replaced two**
20 **years into the home?**

21 A Yes. The reason -- the difference between the two is
22 that the one on the top was exposed to some, and that
23 deteriorated the actual material. The one on the balconies were
24 covered with roof and tile which, was I guess it maintained the
25 materials.

1 Q Same waterproofing materials though, correct?

2 A Same waterproofing materials.

3 Q Sure. As a certified residential contractor, how would
4 you characterize the damage that you would see in this picture
5 the ceiling in the garage?

6 A I mean --

7 Q It's bad, right?

8 A Yes.

9 Q Not acceptable is it?

10 A No.

11 Q How about the damage to the middle balcony?

12 A Yes.

13 Q Pretty bad, right?

14 A Yes.

15 Q How about this damage to the baby's room, pretty bad,
16 right?

17 A Yeah.

18 Q And that's next to the deck, correct?

19 A Not a hundred percent, but that's facing the courtyard
20 area.

21 Q Did that have the same waterproof and structure as the
22 flat roof?

23 A Yes.

24 Q How about this balcony, how would you characterize
25 that?

1 A A lot of water damage.

2 Q Rotted out, correct?

3 A Yes.

4 Q In need of replacing, correct?

5 A Yes.

6 Q How does this look, pretty awful, right?

7 A Yes.

8 Q You would say that this structure needs to be replaced,
9 correct?

10 A You know in looking at pictures, yes.

11 Q If this was a house that you built this would not be
12 acceptable, right?

13 A I had it built for me, I spent a lot of money on that
14 house, I would not have paid all of that money for a house to be
15 in this condition.

16 Q That wasn't my question. My question was, you wouldn't
17 build a house like this, would you?

18 A I would not build a house.

19 Q And if this was your house, you would have felt like it
20 needed repaired, wouldn't you?

21 A If I were to see these damages, yes.

22 Q The roof leak that had occurred in this case in 2009
23 happened after you stopped paying your mortgage, correct?

24 A Correct.

25 Q You told the Mahony's that the staining on the garage

1 **ceiling was cosmetic; is that right?**

2 A I told them that there are low spots that I swept off
3 the water with a broom. I had to -- like I told him just to
4 keep it sealed every six months, or if you want to go get it --
5 kept -- or if you want to get it releveled.

6 **Q I think I said garage, not the deck, I'm talking about**
7 **the garage ceiling.**

8 A The garage ceiling was as a result of the main water
9 leak that we had, so after that was fixed, there was no issues
10 once we replaced that drywall.

11 **Q Right. But you told them it just needed to be touched**
12 **up, there was nothing wrong with it.**

13 A The drywall needed to be touched up.

14 **Q And all you told them was the balconies needed to be**
15 **sealed and perhaps releveled, there was nothing wrong with them?**

16 A We had no issues, we had no water coming in as long as
17 you kept it dry.

18 **Q You had no water coming through?**

19 A Not that I could see.

20 **Q Didn't the Mahony's have a right to rely upon the**
21 **things that you said about the condition of the home?**

22 A I was not giving him any -- at the time I was just
23 talking to him as a homeowner. Now, these items we were walking
24 through the whole house pointing out things about the house that
25 he wanted to know.

1 Q I'll try again. Do you think you had a right to rely
2 upon the representations you've made about the condition of the
3 home?

4 A I told him about everything I knew about the house.

5 MR. KELSKY: Judge, I have no further questions.

6 THE COURT: Redirect, Mr. Soto?

7 MR. SOTO: No redirect, Your Honor.

8 THE COURT: Members of the jury, if you have any
9 questions for this witness, if you'll raise your hands.
10 There are no additional questions. You can step down and
11 have a seat next to your attorney.

12 All right. Members of the jury, we're at a good
13 stopping point for the evening. The attorneys are reporting
14 that they are on schedule, and we're still hopeful we'll
15 conclude this case tomorrow. It's somewhat of an imprecise
16 timing with trials, but we will do our best, so that's what
17 we're hoping for.

18 So go ahead and pack up your notepad and pens. I
19 would like you here and ready to walk in the courtroom at
20 9:00 tomorrow, and, again, as soon as I'm finished with my
21 morning hearings we'll get started.

22 Let me go over your evening instruction, and I know
23 you heard them before, but you heard a full day of testimony
24 and they are very important that you continue to comply with
25 these instructions. You cannot do any independent research

1 of any kind through any sort, this includes something as
2 simple as looking up a word in the dictionary. You cannot
3 do that. All of the jurors must hear the same evidence at
4 the same time in the presence of the judge and the
5 attorneys. Doing research means you cannot look up things
6 on the Internet, you cannot look up things in books, the
7 newspaper, and you cannot visit the scene of anything that's
8 been discussed since this trial. If you understand and will
9 follow that instruction, please raise your hands. All hands
10 are raised. You cannot discuss this case. You have not
11 begun deliberations, and you will not begin those until I
12 give you the authority to retire to the jury room for that
13 purpose. So you cannot discuss anything about the case
14 amongst yourselves or with family members, employers or
15 friends. This means directly or indirectly, so not in
16 person, not on the phone, and not by any electronic means.
17 If you understand that instruction and will follow it,
18 please raise your hands. All hands are raised. With that,
19 have a nice evening, and I'll see you tomorrow morning at
20 9:00.

21 THE DEPUTY: All rise for the jury.

22 (The jury was escorted from the courtroom.)

23 THE COURT: You can be seated. Okay. We are
24 going to go through the jury instructions now, your clients
25 are welcome to stay if they want to, or they can leave if

1 they want to. It's really up to them.

2 All right. I have the instructions that were
3 provided to me at the beginning of the case.

4 What is the first instruction that you have, is it
5 401.1?

6 MR. KELSKY: I actually have them in numerical
7 order from the beginning, but the first substantive
8 instruction is 401.1.

9 THE COURT: That will be the first instruction the
10 jury receives.

11 Are we starting with 401.1?

12 MR. KELSKY: That's introduction.

13 MR. SOTO: No objection, Your Honor.

14 THE COURT: And your next one?

15 MR. KELSKY: I believe would be the 401.2.

16 MR. SOTO: Yes, Your Honor, and I have a
17 handwritten copy as well as written copy of the summary of
18 the claims.

19 THE COURT: Okay. Can I see your revised copy?

20 MR. SOTO: Yes, Your Honor. May I approach?

21 THE COURT: Yes.

22 MR. SOTO: And I'm also providing a copy of the
23 409.11 which are the defenses. I've also provided you with
24 the handwritten version read to the jury as well as the
25 original instruction for the defense is .11.

1 THE COURT: All right. So after 401.1 will be the
2 summary of the claim. We'll come back to how it will
3 ultimately be worded, but for right now it will be the
4 summary of the claim, what's the next one?

5 MR. KELSKY: 401.3, evaluating the evidence.

6 THE COURT: Do you agree, Mr. Soto?

7 MR. SOTO: Yes, Your Honor.

8 THE COURT: The next one?

9 MR. KELSKY: 409.7, the issue on plaintiffs'
10 claims.

11 THE COURT: Do you agree, Mr. Soto?

12 MR. SOTO: Yes, Your Honor.

13 THE COURT: And 409.07, the first, second, third,
14 fourth, fifth.

15 MR. SOTO: Yes, Your Honor.

16 MR. KELSKY: 409.10, burden of proof on the main
17 claim.

18 THE COURT: Do you agree, Mr. Soto?

19 MR. SOTO: Yes, Your Honor.

20 THE COURT: The next one?

21 MR. KELSKY: 409.11, but I have an objection to
22 that.

23 THE COURT: Okay. So it will be a defense issue
24 Mr. Soto's proposing the retyped one, so we'll come back to
25 that.

1 MR. KELSKY: The same objection as to 409.12,
2 burden of proof on the defendants' case.

3 THE COURT: Okay. And the next one.

4 MR. KELSKY: The next one I have is 409.13, the
5 modified one which I handed Your Honor.

6 THE COURT: Do you object to it, Mr. Soto?

7 MR. SOTO: Your Honor, we reserve objection on
8 that since it was right after the order, but if we're not
9 going to be objecting to late jury instructions, then I
10 would be withdrawing that afterwards.

11 THE COURT: Your objection is based on being late?

12 MR. SOTO: I'll reserve that objection, Your
13 Honor, and we'd ask that we go back to it with the same idea
14 that if he objects to my jury instruction, this one was
15 provided after the deadline for that.

16 MR. KELSKY: Just so we're clear, I'm not
17 objecting to the timeliness of the instruction, I'm
18 objecting to the competency of the instruction.

19 THE COURT: That's how I understood it.

20 MR. SOTO: Then, Your Honor, no objection.

21 THE COURT: At this point we're doing the final
22 instruction.

23 MR. SOTO: Yes, Your Honor, no objection.

24 THE COURT: Okay. So 409.13 would be --

25 MR. KELSKY: My point, Judge, I think really the

1 only element of damage that should go to the jury would be
2 item number four, the measure of the calculation.

3 THE COURT: And are you -- tell me the basis.

4 MR. KELSKY: The basis is that we're not claiming
5 alternative living expenses, loss of use of the home, and
6 the cost of expert testing to the extent that there were
7 out-of-pocket expenses to determine the defects of the home,
8 they were subsumed in the summary produced in number 4.

9 THE COURT: All right. So you are withdrawing
10 two, three, and five?

11 MR. KELSKY: Correct. Number five is included in
12 number four. There is just not a separate line item.

13 THE COURT: Any objection, Mr. Soto?

14 MR. SOTO: No objection, Your Honor.

15 THE COURT: All right. So with that modification
16 409.13, had the same introductory sentences and then number
17 one, out-of-pocket expenses to determine the defects in the
18 home. Number two, the difference between the actual value
19 of the property and the value of the alleged facts regarding
20 the difference between the purchase price and the real or
21 actual value of the property, and the time the problems were
22 discovered.

23 MR. KELSKY: Yes, that's correct.

24 THE COURT: And end it there.

25 Okay. What's the next one?

1 MR. KELSKY: The next one I have is 601.1.

2 THE COURT: Do you agree, Mr. Soto?

3 MR. SOTO: Yes, Your Honor.

4 THE COURT: Your next one.

5 MR. KELSKY: 601.2.

6 THE COURT: A and B?

7 MR. KELSKY: Yes.

8 THE COURT: Do you agree?

9 MR. SOTO: Yes, Your Honor.

10 THE COURT: And the next one.

11 MR. KELSKY: I'm sorry, Your Honor, unless I
12 missed it, the subject of the instruction, the verdict
13 should not be -- is that 601?

14 THE COURT: I've got 7.

15 MR. SOTO: Yes, Your Honor, that's the next one I
16 have as well.

17 THE COURT: 601.5 should be the next one.

18 MR. SOTO: Yes, Your Honor.

19 THE COURT: Is that what you're referring to?

20 MR. KELSKY: I'm referring to the instruction
21 referring to your verdict should not be based upon prejudice
22 or sympathy.

23 THE COURT: Okay. If you look close to number 7,
24 at the bottom of the first page where the paragraph starts,
25 in reaching your verdict, and see if that's what you're

1 referring to.

2 MR. KELSKY: Yes. That's exactly what I'm
3 referring to.

4 THE COURT: And then the concluding instruction
5 after reviewing the verdict form.

6 Okay. And then there are three instructions that
7 are not agreed to. The summary of the claims, 401.2,
8 409.11, defendant issues, and then 409.12, burden of proof,
9 the defendant issues.

10 MR. SOTO: Yes, Your Honor.

11 THE COURT: All right. This could be handled a
12 couple of ways. We can go ahead and address the plaintiffs'
13 position on this, or we can wait until the defense has
14 rested, if we do that you're going to have to have
15 alternative instructions drafted.

16 MR. KELSKY: I'd rather handle it now if we can.

17 MR. SOTO: Your Honor, it's the defense preference
18 to wait until tomorrow.

19 THE COURT: I think because it's your preference
20 it needs to be at the conclusion of your case.

21 MR. KELSKY: I appreciate that. My position is
22 that there are affirmative defenses to begin with to the
23 claim, so there wouldn't be an alternative instruction that
24 I would be -- that I would be -- that would be submitted.

25 THE COURT: That they would be just withdrawing --

1 MR. KELSKY: Or that they would be more stricken.

2 THE COURT: All right. Let me just take a look at
3 them. I am -- Mr. Soto, I will give you a chance to
4 respond, but I would like Mr. Kelsky to go ahead and make
5 his argument on the assumption of the risk.

6 MR. SOTO: Yes, Your Honor.

7 MR. KELSKY: Your Honor --

8 THE COURT: I'm generally familiar with the law on
9 this, so -- and Mr. Soto, if you need additional time to
10 respond, I may have to handle that first thing in the
11 morning.

12 MR. SOTO: Yes, Your Honor.

13 THE COURT: Okay. Mr. Kelsky, if you'd like to go
14 ahead.

15 MR. KELSKY: The issue in the case is it's a
16 fraudulent misrepresentation case. It's not a claim
17 premised upon or based upon negligence. It's a claim based
18 upon specific representations by the Rodriguez's, and before
19 I talk about the case law, Your Honor, if you'll look at the
20 instruction there at 409.7, I'm trying to get there as well.
21 The actual standard jury instruction says at the bottom,
22 Plaintiffs may rely on a false statement even though its
23 falsity could have been discovered if plaintiff had made an
24 investigation. So with the jury instruction in mind, and in
25 conjunction with the fact that this is not a negligence

1 claim, assumption of the risk is a defense to a negligent
2 situation. There is some case law out of the Fourth
3 District, a case called Eliza Stephenson Meyer, M-e-y-e-r
4 versus Thompson, T-h-o-m-p-s-o-n, and that's at 861 So. 2d
5 1256, and in that case there was a fraud claim brought
6 against the seller which happens to be somewhat similar to
7 the case because it deals with a contractor who was a
8 seller. And the argument that was attempted to be advanced
9 was that this should be a comparative fault issue here. And
10 in other words that the buyer should be assessed fault for
11 not doing A, B, and C, and the court rejected that on the
12 basis of, this is not a negligence action, this is a
13 fraudulent misrepresentation action to acquire exception of
14 the risk standard to and fault of a negligent -- a
15 fraudulent misrepresentation would be to change the
16 liability issue and would allow the defendant to somehow be
17 excused from their false representation.

18 In other words, they would like to make -- in fact,
19 they were trying to make a negligent misrepresentation
20 claim, and I don't know if Your Honor remembers but many
21 months ago when we first had a motion to dismiss in this
22 case, one of the things that was specifically argued is
23 there's no claim for negligent misrepresentation, there's
24 only claim for fraudulent misrepresentation. To meet the
25 claim of the assumption of the risk would be to assert the

1 content of negligence into a fraudulent misrepresentation
2 claim, and that is specifically not the nature of the claim.
3 So from a competency standpoint, our position is the
4 assumption of the risk has no applicability to a fraudulent
5 misrepresentation claim. In fact, the jury instruction just
6 essentially proved that point, and that's our argument on
7 the issue.

8 THE COURT: Mr. Soto.

9 MR. SOTO: Thank you, Your Honor. I'll cite the
10 case Billian v. Mobil Corp. which is at 710 So. 2d 984, and
11 they talk about the history of the Johnson case.

12 THE COURT: Do you have a copy of it?

13 MR. SOTO: Yes, Your Honor, forgive me. May I
14 approach?

15 THE COURT: Yes. Thank you.

16 MR. SOTO: And they talk about the state of mind.
17 In this regard the state of mind under Johnson is analogous
18 to a negligent misrepresentation case where one who supplies
19 false information exposes himself to liability if he fails
20 to exercise reasonable care or competence in obtaining or
21 communicating the information. The practical effect of
22 Johnson is to encourage disclosure --

23 THE COURT: Where are you reading?

24 MR. SOTO: Oh, forgive me, Your Honor, page 4.

25 The practical effect of Johnson is to encourage

1 disclosure in those transactions where a seller might be in
2 doubt as to whether a set of facts should be revealed to
3 buyers -- potential buyers.

4 Nothing in the Supreme Court's holding in Johnson
5 indicates that actionable nondisclosure must be accompanied
6 by the same intent to defraud require another fraud case.
7 And that's what we have the standard proof of preponderance
8 of the evidence rather than clear and convincing. And the
9 court goes on to say, Johnson is consistent with the modern
10 view that theoretical basis of liability for nondisclosure
11 is not an outgrowth of the law of fraud, where a
12 nondisclosure of material information would be characterized
13 as type of misrepresentation. Over 60 years ago, Dean
14 Keeton articulated the principle upon which Johnson is
15 founded: It would seem that the object of the law in
16 nondisclosure cases should be to impose on the parties to
17 the transaction a duty to speak whenever justice, equity,
18 and fair dealing demand it.... This duty to speak does not
19 result from an implied representation by silence, but exists
20 because a refusal to speak constitutes unfair conduct....
21 The question is one of fair conduct, just as negligence is a
22 question of fair conduct.

23 What I would argue, Your Honor, is that Johnson and
24 its progeny are from the negligence standard and are not
25 from the fraud standard and that it is quasi-negligence and

1 therefore it wouldn't preclude defenses that would be
2 applicable to any other court.

3 I did exhaustive research to try to find out any
4 court that has ever ruled that assumption of risk could not
5 be applied in a case of fraudulent misrepresentation under
6 Johnson, and I couldn't find any, and, you know, Mr. Kelsky
7 couldn't find any either.

8 In this case we have multiple representations of
9 things going on in the balcony, in the garage ceiling, in
10 the baby's room, in the French doors, where there was a
11 discussion and a knowledge and to say that that has no
12 meaning, and that they couldn't assume any risk on that,
13 would defy what normally would be a normal defense in a
14 negligence case.

15 THE COURT: Mr. Soto, if you look at the Meyer
16 versus Thompson case, that's where there wasn't a
17 comparative negligence. In Florida, the assumption is the
18 risk has been assumed into comparative negligence. So how
19 -- I'd like you to address the Meyers case, v Thompson.

20 MR. SOTO: Well that was the case of first
21 impression from me, Your Honor, I just got it. I can tell
22 you in Johnson they did do an inspection, and so that was
23 never addressed by the Johnson court, and I would say
24 because the courts have never addressed specifically the
25 defense that there wasn't a specific finding to include this

1 all together.

2 THE COURT: All right. Any new arguments that
3 haven't been made?

4 MR. KELSKY: I would only just quote one of the
5 paragraphs from the Meyer case which the court has for the
6 record. It says -- in talking about Billian which is the
7 case that Mr. Soto cited, it says, however, our
8 acknowledgement of that concept does not convert to
9 purchaser's claim of fraudulent concealment into a negligent
10 misrepresentation claim. And the court concluded, thus not
11 only were there no allegations of negligence, the substance
12 of this cause of action did not fall within the term
13 negligence. This rendered the affirmative defense
14 comparative negligence inapplicable.

15 And as the court just pointed out, the assumption
16 of risk has been brought into comparative negligence. For
17 this reason we believe the affirmative defenses is legally
18 inapplicable to this case.

19 THE COURT: All right. Mr. Soto had asked until
20 tomorrow, so I'm going to give him a chance to read the
21 Meyer case, and Mr. Soto if you just be prepared in the
22 morning to argue, and if there is any additional argument
23 that you'd like to present, I will give you an opportunity
24 to read the case before I announce a final decision on that.

25 All right. So I've heard the arguments, and I'm

1 going to allow Mr. Soto the opportunity to read the Meyer
2 case.

3 There's a second defense raised by the defendant,
4 and then superseding intervening cause. Mr. Kelsky, would
5 you like to address that?

6 MR. KELSKY: Sure, Your Honor. The substance of
7 that claim as I understand it is that Mr. Smith may have
8 exposed some area and spread some mold throughout the
9 premises. And really they might call it superseding and
10 intervening cause, but what they're really trying to do is
11 establish some type of third-party liability. Now, you're
12 going to create third-party liability regardless of what
13 it's called. That's not the substance of it, but you not
14 only have to plead, you also have to identify the third
15 party and, again, the only reason I'm bringing this up is
16 because it's not a negligence claim. This is a claim about
17 misrepresentation. There is nothing in the -- certainly
18 nothing in the testimony, but there is no law that I'm aware
19 of allowed superseding and intervening cause, never was
20 claimed, never was the defense to be applicable to the
21 various reasons that the defense just talked about
22 inapplicable. So it's our position that a superseding
23 intervening cause was nothing more than a negligence
24 defense. This is not a negligence case. This is a
25 misrepresentation case, and under Meyer for the same reason

1 the defense has no legal applicability in this instance.

2 THE COURT: Mr. Soto.

3 MR. SOTO: Again, under Billian, Your Honor, they
4 discuss how the case under Johnson, the fraudulent
5 misrepresentation is a quasi-negligence, quasi-fraud case
6 which is why we don't apply intervening or fraud factors or
7 affirmative and clear and convincing evidence.

8 The evidence showed, as you heard today and
9 yesterday, that there was a handyman who went around who
10 could have caused these damages, and then they used that to
11 try to say that Mr. Mahony who said it and knew it when in
12 fact it was fabricated and created by the handyman.

13 THE COURT: Do you have any case law that you
14 would like me to consider?

15 MR. SOTO: Not other than the Billian case which
16 talks about how this is a quasi-fraud quasi negligence claim
17 and therefore it doesn't preclude all defenses to a
18 negligence claim.

19 THE COURT: Mr. Kelsky.

20 MR. KELSKY: I just want to clarify that the
21 burden of proof on a fraudulent misrepresentation claim and
22 the greater weight of the evidence not clear and convincing
23 evidence, and that the issue of quasi-negligent and
24 quasi-fraud is a misnomer, this a fraudulent
25 misrepresentation claim, and the analysis would still be

1 applicable under the Meyer case and not the Billian case.

2 In fact, Meyer quotes Billian and discusses it. That's our
3 position, Judge.

4 THE COURT: All right. Like I said, I am familiar
5 with the Meyer case. I will reread the Billian case and
6 give you my ruling on that as well in the morning.

7 Let me just ask, does the legal causation
8 instruction, Mr. Soto, does refer to negligence. I mean
9 that had an -- there is an intervening cause, but it's
10 really applicable to negligence. Do you want to address
11 that?

12 MR. SOTO: Just to the extent that it goes
13 directly to damages here, Your Honor, and is relevant for
14 the jury to consider.

15 THE COURT: All right. I'll give the defense a
16 chance to read the case presented by the plaintiff, and then
17 I'll reread the Billian case and have a ruling for you. I
18 think -- I did receive your e-mail, so that's come through.
19 So there's new enough instructions that I don't -- for
20 example, if I grant it in part and deny it in part, we could
21 make the modification. But if you will also bring your
22 laptop.

23 Here's -- before we talk about the verdict form,
24 let me go through, announce the instructions again, but who
25 is going to be responsible tonight for making the jurors a

1 copy?

2 MR. KELSKY: I brought a ream of paper with me and
3 a color printer, so I'll do it.

4 THE COURT: They don't need to be in color, black
5 and white. But they do need to -- if you look at the
6 introduction to show standard jury instructions. So the
7 preference adopted by the Supreme Court is that the jurors
8 do not have titles on their sets, and they do not have any
9 case cites, or accepted, rejected, so it needs to be very
10 vanilla on this. It is easier to print one instruction per
11 page. I've seen it done both ways. I'm fine either way.
12 It just makes it a little harder to modify if it's all in a
13 row versus separate pages.

14 My set, and I would suggest your set, but it's your
15 choice, I do like the jury instructions numbered, so I know
16 what I'm reading, and I know whether it's a standard
17 instruction or not, so I suggest for my set and the two
18 attorneys' sets that you use the title. It doesn't matter
19 if it's case cites, accept or reject and the title and any
20 other notations because it would only be on the jury's
21 copies. Okay. Anybody have any objection to what you heard
22 on that?

23 Mr. Soto?

24 MR. SOTO: No, Your Honor.

25 THE COURT: You all right with Mr. Kelsky

1 volunteering?

2 MR. SOTO: Yes. Sounds good to me.

3 THE COURT: All right. Verdict form. Do you have
4 a proposed verdict form?

5 MR. KESKY: It was attached to the packet.

6 THE COURT: Let me see if I have it here.

7 I do.

8 Do you have a copy of it, Mr. Soto?

9 MR. SOTO: Yes, Your Honor.

10 THE COURT: Any objection to the proposed verdict
11 form?

12 MR. SOTO: To the extent that it includes the
13 defenses raised.

14 THE COURT: Do you have a proposed verdict form?

15 MR. SOTO: I could produce one for tomorrow or
16 give some proposed ones to counsel.

17 THE COURT: You probably -- you are welcome to do
18 that, again, I haven't ruled, but I would suggest that if
19 you're proposing an alternative form that you get that done.

20 MR. SOTO: Yes, Your Honor.

21 THE COURT: All right. And then you bring it on a
22 jump drive or a disc or something.

23 MR. SOTO: Yes, Your Honor.

24 We could e-mail them to your JA, would that be
25 sufficient?

1 THE COURT: I would prefer you e-mail it to me
2 okay. You could e-mail them both. Please do not write
3 anything, do not write any cover notes or argument, and make
4 sure the other side is cc'd on that, or I will not open it.

5 MR. KELSKY: I don't know -- the e-mail that I
6 sent to your judicial assistant Mr. Soto wasn't copied on
7 it, but I can recopy him on the e-mail.

8 THE COURT: Okay. I'm going to forward it to you.
9 Mr. Soto, what's your e-mail address?

10 MR. SOTO: Darren@darrensotolaw.com.

11 THE COURT: You'll have to spell it for me.

12 MR. SOTO: D-a-r-r-e-n-@-d-a-r-r-e-n-
13 s-o-t-o-l-a-w.com.

14 THE COURT: Okay. Mr. Kelsky, you're
15 bradkelsky@kelskylaw.com, is that the one you want me to
16 use?

17 MR. KELSKY: Yes.

18 THE COURT: I'm just going to forward back to you
19 what you sent, that way everybody has seen what I've seen.

20 All right. So you're going to e-mail a proposed
21 verdict form, Mr. Soto?

22 MR. SOTO: Yes, Your Honor.

23 THE COURT: Okay. To opposing counsel tonight.

24 MR. SOTO: Yes, Your Honor.

25 THE COURT: All right. Any other issues we need

1 to address before tomorrow?

2 We're going to announce those instructions just as
3 a final confirmation.

4 401.1, 401.2, you will also have 401.2 modified,
5 print that out as if I had already ruled in the plaintiffs'
6 favor, 401.3, 409.7, 409.10. Next is defense proposed,
7 409.10, is defense proposed 409.11, 409.12 that's defense
8 proposed, burden of defense issue, 409.13 as modified, so
9 that will now have two subsections, but you need to modify
10 that tonight and make your ten copies.

11 MR. KELSKY: Judge, I'm sorry. I may have been
12 not clear. I think that the only one that should go under
13 there is the number four, the cost of expert testing --
14 excuse me -- the first element, so it's actually should have
15 been number four.

16 THE COURT: So you're deleting one, two, three,
17 and five?

18 MR. KELSKY: It's already under number four.

19 THE COURT: Any objection?

20 MR. SOTO: No, Your Honor.

21 THE COURT: All right. So if you will redraft
22 that and make sure you have sufficient copies.

23 Then 601.1, 601.2(a) and (b). That can be on one
24 page, just delete the titles and subtitles and of course the
25 accept and reject. 601.5 and then number 700.

1 MR. KELSKY: You want each instruction on the page
2 with the number, no titles or nothing.

3 THE COURT: It doesn't -- if you have a different
4 -- either party prefers it all on -- just so it's straight
5 from page, just so -- it works easier to have one
6 instruction on a page, and it's easier if changes need to be
7 made.

8 Do you have a strong feeling, Mr. Soto?

9 MR. SOTO: No, Your Honor.

10 THE COURT: Mr. Kelsky, you probably --

11 MR. KELSKY: Your Honor, I prefer that.

12 THE COURT: Okay. What I would also suggest is
13 that you e-mail a set of what you're printing from the jury
14 of Mr. Soto so he knows and his set as well. Okay?

15 All right. Anything else that needs to be
16 addressed?

17 MR. SOTO: No, Your Honor.

18 THE COURT: All right. Then if you'll just be set
19 up and be here a few minutes before 9:00. I usually like
20 the attorneys here between a quarter of and ten of, just in
21 case there's something we need to address, we don't keep the
22 jury waiting. And as every other morning, I just can't
23 predict who shows up.

24 MR. SOTO: For time management, from my
25 understanding, there's only Mr. Hoyos testifying tomorrow

1 morning. If he takes a total of an hour, I would be
2 surprised unless Mr. Soto disagrees, but if we were to
3 assume hypothetically that by 10:00 we'd be able to close in
4 the morning and have the jury go out for lunchtime, or would
5 it be in the afternoon.

6 THE COURT: How much time do need for closings?

7 MR. KELSKY: I don't need more than 30 minutes.

8 MR. SOTO: Your Honor, I believe it could be done
9 before lunch.

10 THE COURT: Okay. I'm fine. Usually what we'll
11 do is -- I'm fine with it as long as the courtroom staff is
12 all right. We have wonderful deputies that are usually
13 right on top of it. What we'll do is we'll have the jury
14 fill out lunch menus, so if they break about lunchtime,
15 their lunch will be delivered and waiting for them or pretty
16 close to it.

17 Deputy, are you here tomorrow?

18 THE DEPUTY: Yes.

19 THE COURT: If you could just have menus ready to
20 give them say at the midmorning break, not first thing in
21 the morning.

22 THE DEPUTY: Okay.

23 THE COURT: And we can go ahead and have the
24 alternate order too, and then if lunch comes he can take it
25 with him.

1 So, again, unless something changes and we move it,
2 but we'll just kind of wait and see. The deputy's really
3 good at checking with me.

4 Any other questions regarding timing?

5 MR. SOTO: No, Your Honor.

6 THE COURT: The only way we wouldn't do that is if
7 it looks like we're going to go way past the lunch break,
8 and it looks like it's just too long for the jury, then we
9 might break for lunch, but it sounds like you anticipate
10 that we could at least turn it over to them by 1:00 at the
11 latest.

12 MR. KELSKY: I honestly think my closing will be
13 less than a half hour, and so I see no reason why closing
14 wouldn't be done by 11:30.

15 MR. SOTO: Yes, Your Honor, I would be amazed if
16 we go past 12:00.

17 THE COURT: All right. Anything else from either
18 party?

19 MR. KELSKY: No, Your Honor.

20 THE COURT: Well everybody have a good evening,
21 and I'll see you tomorrow.

22 (The proceedings concluded at 5:10 p.m.)
23
24
25

CERTIFICATE OF REPORTER

STATE OF FLORIDA

COUNTY OF ORANGE

I, SUSAN MULLEN, Court Reporter, certify that I was authorized to and did stenographically report the proceedings had at the time and place herein, and that the transcript is a true and complete record of my stenographic notes.

I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this the 22nd day of October, 2015.



SUSAN MULLEN



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